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IN THE

Supreme Court of the United States

October Term, 1946.

No. 1246

WALL WIRE PRODUCTS COMPANY,

Petitioner,

against

J. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, WALL WIRE PRODUCTS COMPANY, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Sixth Circuit (R. p. 37), which reversed a judgment of the United States District Court, Eastern District of Michigan, O'Brien, D. J. (R. p. 32), in favor of the petitioner.

Judgments Below.

The findings of fact and conclusions of law and the order of the United States District Court for the Eastern District of Michigan, appear on Pages 29 to 32 inclusive of the Transcript of Record, and the judgment and opinion of the Circuit Court of Appeals, which was written for reversal of the District Court's opinion by Circuit Judge McAllister, with Circuit Judge Miller dissenting, appears on Pages 37 to 46 of the record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended, 28 U. S. C. A., Section 347, et seq. The decision of the Circuit Court of Appeals was rendered on the 17th day of March, 1947. The time to apply for this Writ expires on June 16, 1947.

Question Presented.

Whether an employer corporation may distribute its profits to its employees, in accordance with a plan requested and devised by its employees through their union as their duly selected bargaining agent on a per capita basis without violation of Section 7 (a) (3) of the Fair Labor Standards Act of 1938?

Answered in the affirmative by the United States District Court for the Eastern District of Michigan.

Answered in the negative by the United States Circuit Court of Appeals for the Sixth Circuit.

Statute Involved.

The Federal statute involved is the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. A. sec. 201).

The particular sections of the statute involved in this proceeding are:

> "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
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> • • •
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed.

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person——

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14.

Sec. 17. The district courts of the United States and the United States court of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C. 1934 edition, title 28, sec. 381), to restrain violations of section 15."

Statement.

On April 14, 1944, the Administrator of the Wage and Hour Division, United States Department of Labor, commenced this action to enjoin the petitioner, Wall Wire Products Company, from violating the provisions of the Fair Labor Standards Act of 1938. It is admitted and found

as a fact by the District Court that the alleged violations were practices requested and devised by the employees of the petitioner and were contractual obligations of the petitioner with its collective bargaining agent union, and that these proceedings were instituted by the Administrator without the request or assistance of the employees or their union. The petitioner filed answer. Both sides filed motions for summary judgment with attached affidavits as to the facts. The District Court dismissed the Administrator's motion and granted that of the petitioner, denying the injunctive relief (R. p. 32).

The Administrator appealed to the United States Circuit Court of Appeals for the Sixth Circuit, which reversed the United States District Court for the Eastern District of Michigan, Circuit Judges McAllister and Hicks concurring and Circuit Judge Miller dissenting (R. p. 46).

The facts are not in dispute.

The Wall Wire Products Company is engaged in the business of manufacturing refrigerators and employs more than one hundred workers, producing goods for interstate commerce. On January 27, 1941, Wall Wire Products Company entered into a contract with the International Association of Machinists, Lodge No. 1312, which group was the collective bargaining agent for the employees. Therein it was provided that certain hourly wages should be paid for designated job classifications and, further, that: "Time and one-half will be paid for time worked in excess of eight hours per day or forty hours per week, but not for both." (R. p. 24.)

Wall Wire Products Company has paid the agreed hourly rates, together with time and a half thereon for all work over eight hours per day or forty hours per week. The rates and classifications in the contact were standard in practice and amount for the industry and area (R. p. 24).

It was further provided in the agreement of February 27, 1941, that the Wall Wire Products Company would pay to its employees twenty-five per cent of the company's

profits as determined at the end of the year before taxes. The section of the agreement applying to profit-sharing concluded as follows: "The 25% profit sharing shall be distributed each month to individual employees in a manner to be determined by the employees." This profit sharing was specifically noted to be given in addition to, and not in substitution for the hourly rates specified (R. p. 24).

Wall Wire Products Company thus agreed to pay one-fourth of its annual profits to its employees, to be distributed as they might direct. The company further agreed that it would make monthly payment on account of such distribution (R. p. 24), this being done for the obvious purpose of providing immediate incentive and compensation to the men at the machines.

The employees requested the company to distribute the profit sharing payments on a per capita straight-time basis and that their individual skills and productive capacities and all overtime be ignored in the profit sharing distribution. The company complied with the employees' request in distributing in 1941 a total sum of $26,223.00, which was not twenty-five per cent of the profits, but only the amount paid on account, further adjustments being made in 1942 after the closing of the books (R. p. 25).

On May 2, 1942, a new agreement was entered into between Wall Wire Products Company and its employees through the same collective bargaining agent for the employees, effective as of January 1, 1942 and continuing until May 1, 1943. The profit-sharing offer of the company was rewritten and embodied in the new contract to incorporate the procedure developed by the union, as contained in Article III, Section 3, attached to the affidavit of the Administrator (R. p. 12).

There was distributed to the employees from profits $5,540.00 in 1942 and $17,610.00 in 1943. Substantial sums from profits have been paid in each year since (R. p. 26). In many months, however, no payment on account of profits has been made, as it was impossible to determine or fore-

cast the annual profits accurately in advance. Where it has been evident that the month's operations had added to the annual profit, the company has taken the eligible number of employees, together with the number of straight-time hours worked and attempted to fix a sum per capita which would approximate twenty-five per cent of the profits earned.

At no time has the International Association of Machinists, Lodge No. 1312, as the collective bargaining agent, or any individual employee of the petitioner, made demand upon the petitioner, for any sum in excess of the stipulated percentage of profits as paid under the agreement. At all times the petitioner has paid the percentage of profits to the employees in the agreed amounts and in the manner agreed upon by the union representing the employees (R. p. 26).

No question concerning the profit-sharing plan has been referred to the employer-employee Joint Grievance Board for settlement in accordance with the terms of the agreement between the petitioner and the union (R. p. 27).

Circuit Judge McAllister's opinion concludes with the following statement (R. p. 45):

> "We are well aware that the distribution of profits in the past in this case has been made exactly as requested and devised by the employees through their duly selected bargaining agent; that there nowhere appears any disposition on the part of appellee (Wall Wire Products Company) to circumvent the Fair Labor Standards Act; and that the distribution of the share of profits to the employees which is sought by the Administrator may present time-consuming and complicated problems of computation and accounting."

Reasons for Granting the Writ.

(a) The decision of the Circuit Court of Appeals for the Sixth Circuit in this case endangers all profit-sharing agreements in effect in the United States.

It has generally been considered socially desirable to share industrial profits, and the Circuit Court of Appeals notes that its own decision presents "time-consuming and complicated problems of computation and accounting." The action of the Administrator herein, supported by the reversal of the District Court for the Eastern District of Michigan by a two to one decision of the Circuit Court of Appeals, creates uncertainty which will inevitably not only prevent the spread of profit-sharing with employees but, what is worse, will also cause the abandonment of such plans as are now in effect.

(b) The Administrator of the Wage and Hour Division, United States Department of Labor, is, himself, awaiting decision of the Supreme Court of the United States, recognizing the difficulties of administrative functioning in the uncertain situation now created.

The Administrator has made the following public statement (the date is not available):

> "We do not know yet, I think—although some of my lawyers are already having doubts in view of some recent decisions of the Supreme Court—whether that rule will be accepted and whether such a quarterly test is a valid exercise of administrative discretion. Of course, if the Court subsequently changes that and says that we must consider it whether it is paid quarterly or not, naturally I would have to modify my position; but in accordance with our usual custom, we would not modify it for our purposes retroactively. We would put you on notice as to the future."

This petition for certiorari is being filed simultaneously with a similar petition in the matter of *The Garlock Packing Company v. J. Metcalfe Walling, Administrator* (CCA 2nd, 1947, 12 Labor Cases 63555), which involves variations of the same question.

(c) The decision of the Circuit Court of Appeals for the Sixth Circuit goes beyond the administrative rulings issued under the Fair Labor Standards Act.

It was not until September 2, 1941 that the Administrator issued any applicable ruling. The first applicable ruling of the Administrator divided bonus or profit-sharing payments into three categories: (1) discretionary, (2) non-discretionary but paid quarterly or more frequently and (3) non-discretionary, paid not more frequently than quarterly. The general ruling of the Administrator was that only the second group of bonuses should "be taken into account as a part of the regular rate of pay for overtime purposes." In the instant case profit-sharing was on an annual basis with the possibility of monthly payments on account, which, under the ruling of the Administrator, was not to be considered in the regular rate for calculating overtime.

(d) The decision of the Circuit Court of Appeals for the Sixth Circuit herein violates the intention of Congress, in that it arbitrarily includes in the definition of the words "regular rate" irregular, fluctuating and contingent items, making all compensations, however calculated, earned or paid, the basis for determining the "regular rate."

(e) The interpretation of the words "regular rate" by the Circuit Court of Appeals for the Sixth Circuit conflicts with the prior decisions of the Supreme Court of the United States in *Walling v. Belo,* 316 U. S. 624; and *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419.

(f) The decision of the Circuit Court of Appeals for the Sixth Circuit conflicts with the decision of the United States District Court for the Eastern District of Missouri in *Walling v. Frank Adam Electric Company,* 66 F. Supp. 811, and with the decision of the United States District Court for the District of Massachusetts in *Walling v. Bauch Machine Tool Company,* 4 Wage & Hour Cases 403, decided March 31, 1944. The District Courts of Missouri, Massachusetts, New York and Michigan have all determined that bonus payments made under analogous circumstances were not part of the "regular rate."

WHEREFORE, your petitioner respectfully requests the issuance of a Writ of Certiorari.

Dated: April 12, 1947.

Respectfully submitted,

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PETITIONER'S BRIEF.

The Facts.

The facts are stated in the Petition, page 3.

Argument.

Point I.

The Action of the Administrator and the Judgment of the Circuit Court Would Rewrite the Employment Contract.

The conclusion is inescapable that the Circuit Court of Appeals for the Sixth Circuit reached its conclusion in this case reluctantly and only because it felt that it had no alternative.

The concluding words of Judge McAllister's decision are as follows (R. p. 45):

> "We are well aware that the distribution of profits in the past in this case has been made exactly as requested and devised by the employees through their duly selected bargaining agent; that there nowhere appears any disposition on the part of appellee to circumvent the Fair Labor Standards Act; and that the distribution of the share of profits to the employees which is sought by the Administrator may present time-consuming and complicated problems of computation and accounting."

Admittedly the decision overrides the collective bargaining agreement between the parties and disregards the stipulation of the employees and the union that distribution should be made on a per capita basis. In this case a negotiated contract arrived at between the company and a national union and entered upon and performed in good faith by both parties is sought to be rewritten by the Administrator of the Wage and Hour Division, who seeks

gratuitously to substitute for it a complicated system of payments without any justification for its use or any guide as to its proper application.

Point II.

The Regular Rate of Compensation Under Sec. 7 (a) (3) of the Fair Labor Standards Act Is the Hourly Amount Paid to the Employees During the Work Week for Productivity Exclusive of Overtime and Independent of Market Place Contingencies.

The adjective "regular" is derived from the Latin, meaning "according to rule," "not characterized by variation." It is redundant to define the word so precisely, but the Administrator refuses to give the legislative language any meaning whatsoever and so requires that it be spelled out. "Usual", "ordinary" and "normal" are obvious and simple synonyms.

The Administrator has argued, and the Circuit Court has found that all compensation received must be added together and divided by the number of hours worked to obtain the "regular rate." There is nothing in the statute or in the Congressional proceedings which could possibly support such a preposterous rule. It is respectfully submitted that it is a perversion of the English language and the Congressional intent to say that the "regulate rate" shall be so all-inclusive.

The arguments made by the petitioner are discussed and dismissed by the Circuit Court with recognition of their compelling logic but the weak conclusion that the statutory provisions could not be overcome. The petitioner has argued from the commencement that there was nothing "regular" about a payment which was calculated on an annual basis, a payment which was dependent upon the contingent market place, a payment which would fluctuate from week to week, and a payment which bore no relationship to the standards or the skills applicable to the individual jobs of the employees. The Circuit Court of Appeals for the Sixth Circuit concedes that all of these contingencies, fluctuations

and delays were necessarily involved in calculating the amount of the profit-sharing payments, but concludes that these were unimportant factors "according to the language of the Act as passed by Congress."

It seems incredible that official thinking can drift so far from reality. The Administrator talks about the hourly rate as the "basic" rate as if finding synonyms created differences. But if one were to ask any employee what his "regular rate" was, he would answer by stating the amount of his hourly pay as set forth in the contract. And the Circuit Court of Appeals instinctively felt that the word "regular" should be referable to the hourly rate of compensation. Thus the following appears in the opinion (R. p. 41): "The contract before us is a contract for compensation embodying both the payment of a *regular rate per hour* as well as a share of the profits." (Italics supplied.) Here is a clear statement of the question which is in itself sufficient to settle the dispute. But having thus answered the question by stating it, the Circuit Court apparently became alarmed at the stark simplicity of the result, backed off, tried again and came up with the conclusion that the regular rate is the regular rate plus an irregular rate.

There is no dispute that the shares of profits here involved were net amounts for fiscal years earned in the market place after all charges and were the result of a great many factors other than the individual productivity of the employees. The profit shares were not, and obviously could not be paid weekly; they were not related to individual skills; they were entirely contingent; they could not be calculated mathematically by any formula based on hours worked or units produced.

In a footnote to page 5 of the Administrator's brief filed in the Circuit Court of Appeals the stabilizing benefits of profit-sharing are advocated as providing a "flexible differential which will cause wages to vary with profits." The Administrator is never concerned with the demoralizing contradiction involved in calling a variable "regular",

because he conveniently presumes and concludes that all "compensation must be included in the regular rate for purposes of Sec. 7 (a)" (R. p. 2). But it is, we submit, entirely unwarranted to argue that regularity results from variation.

It is not enough for the Administrator to say that a share of the employer's profits was payable to the employees or to show that payments out of profits were in fact made. There were many months when no payments on account of profits were made. In 1942 the total profit-sharing was $5,540.00 and in 1943 it was $17,610.00 (R. p. 26), but these amounts have no relation whatsoever to volume of business done, units produced, hours worked, or any predetermined or currently determinable factor. On the contrary they represent the net result of each year's operating contingencies.

This was very clearly seen by the courts in the *Bauch* and *Garlock* cases, (*Walling v. Bauch Machine Tool Co.*, D. C. Mass., 1944; *The Garlock Packing Co. v. Walling*, C. C. A. 2nd, 1947, Supra) where bonuses were excluded as not regular. In the *Bauch* case, the company and the union agreed to a plant-wide production bonus plan payable monthly regardless of net earnings. As in our case, it was stipulated that this bonus was in addition to regular wages. The court found the payments not includable for overtime calculations because they "had no relation to individual accomplishment, hours worked, or hourly rates paid." If there was uncertainty at *Bauch*, it is a fortiori true at Wall Wire Products Company where the payment was annual profit-sharing after all charges.

Point III.

There Are No Controlling Precedents.

The Administrator relies upon *Walling v. Youngerman-Reynolds Hardwood Co.*, Supra, and *Walling v. Harnischfeger Corp.*, 325 U. S. 427. The facts in those cases have no application here. In the *Youngerman* case there was an

obviously fabricated thirty-five cent per hour rate with production guarantees and a calculable average of fifty-nine cents per hour actually paid. In the *Harnischfeger* case there were the usual production payments for units produced above standards, and it was decided that the earned piece rate was the regular rate. In both cases the court found the regular rate to be the weekly amount received divided by the hours worked. That principle is not, and should not be disputed, but it can have no possible bearing upon the issue here.

The Administrator quotes the now-familiar language of the *Harnischfeger* case that the courts look "to the actual payments which the parties have agreed shall be paid during each work week." We think that they should, but because annual profit-sharing, however distributed, is not so paid and cannot be determined until a year of contingencies has elapsed, only by forced, doctrinaire construction eliminating entirely the phrase "regular rate of compensation" can Section 7 (a) (3) be read to include in compensation subject to overtime a variable such as profit sharing.

The Administrator has also cited *Walling v. Richmond Screw Anchor Co.*, 154 F. (2d) 780 (C. C. A. 2), (certiorari denied). That case involved a production bonus calculable by each employee at the end of the production period. It was only necessary to know the units produced to figure the extra pay receivable, and this was held to be part of the "regular" compensation. Such a method of compensation is entirely different from that involved here, where the profit-sharing is not only subject to all the local and national economic factors affecting all business but is not even proportioned to productivity or any other stable, currently measureable factor.

Conclusion.

WHEREFORE, it is respectfully submitted that the contractually expressed wishes of Wall Wire Products Company and its employees, arrived at by the collective bargaining process, should be recognized by affirmance of the decree of the District Court.

Respectfully submitted,

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